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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID WALTERS, Plaintiff and Respondent, v. BOUSTEAD SECURITIES, LLC, Defendant and Appellant.	G056250 (Super. Ct. No. 30-2017-00961949) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Kutak Rock, Christopher P. Parrington and Cyrus C. Chen for Defendant and Appellant.

Law Offices of Richard A. Jones, Richard A. Jones and Jarrick S. Goldhamer for Plaintiff and Respondent.

* * *

Plaintiff David Walters and defendant Boustead Securities, LLC (formerly known as Monarch Bay Associates, LLC) (Monarch Bay), arbitrated a dispute relating to Monarch Bay's operating agreement and the payout Walters was entitled to receive upon his departure from the company. The arbitrator concluded Walters was entitled to recover $186,354 plus attorney fees and costs.

In due course, the trial court confirmed that award and denied Monarch Bay's motion to vacate. Monarch Bay now appeals, arguing the arbitrator exceeded his powers and refused to hear material evidence. The record amply demonstrates that neither of those contentions are true. Monarch Bay also argues Walters is not the prevailing party for purposes of an attorney fee award – that, too is false, and we conclude the attorney fee award was appropriate.

Walters filed a motion for sanctions against Monarch Bay for filing a frivolous appeal. For the reasons discussed below, the motion is denied. Under the pertinent contract, however, Walters is entitled to his attorney fees on appeal. We affirm the judgment.

I

FACTS

In June 2012, an Amended and Restated Operating Agreement (operating agreement or agreement) for Monarch Bay went into effect. The members of the LLC were Walters, Keith Moore, Robert "Thad" Mercer, and Byzantine Ventures, a partnership; Robert D. Leppo signed the agreement for the partnership.

The operating agreement states that in the event a member withdraws from the company, the company would repurchase the shares (referred to as units in the operating agreement) owned by that member. The method for determining the price was set forth in a lengthy provision in the agreement. Essentially, it required each party to select an appraiser to determine the fair market value of the units owned by the

withdrawing member. If the two appraisals differed by more than 10 percent, a third appraiser was to be selected by the first two appraisers, and the third appraiser was to determine the value of the units using the criteria set forth in the agreement. "In determining such fair market value, each such appraiser shall consider all opinions and relevant evidence submitted to it by any Member, or otherwise obtained by it and shall set forth its determination in writing together with its opinion and the considerations on which such opinion is based, with a signed counterpart to be delivered to each of the Withdrawing Person and the Company, within thirty days after such appraiser is notified of and accepts its appointment as such. Such determination shall be final, binding and conclusive."

The operating agreement included an arbitration clause, stating that disputes relating to the agreement "shall be resolved exclusively through binding arbitration conducted under the auspices of JAMS pursuant to its Arbitration Rules and Procedures." Further, the arbitration clause stated that "the arbitrator's award shall consist of a written statement as to the disposition of each claim and the relief, if any, awarded on each claim. The award shall not include or be accompanied by any findings of fact, conclusions of law or other written explanation of the reasons for the award." Further, this provision noted: "The parties understand that the right to appeal or to seek modification of any ruling or award by the arbitrator is severely limited under state and federal law. Any award rendered by the arbitrator shall be final and binding, and judgment may be entered on it as provided by law."

Additionally, the agreement included a provision awarding "all reasonable fees, costs and expenses" to the prevailing party in any litigation or arbitration. "Any arbitration award . . . shall contain a specific provision for the recovery of attorneys' fees and costs incurred in enforcing such award or judgment and an award of prejudgment interest from the date of the event giving rise to the claim or dispute at the maximum rate allowed by law."

During Walters's tenure at Monarch Bay, an "Advance Account" was created for him, with those advances to be deducted from future commissions earned. The total amount of the advances, as later established, was $266,000.

According to Walters, he was eventually "forced out" of Monarch Bay; according to Monarch Bay, he "voluntarily withdrew" in 2014. At the time of his departure, Walters owned 28.1789 percent of the company.

Pursuant to the procedure set forth in the operating agreement, both parties engaged an appraiser. The two valuations were more than $1.1 million apart, which exceeded the 10 percent threshold for a third appraiser as set forth in the operating agreement. The parties therefore jointly engaged a third appraiser, Moss Adams LLP (Moss Adams). Moss Adams conducted a "Valuation Analysis" and concluded the company's value was $958,000. The analysis noted: "To the extent the Advance from David Walters totaling $266,000 as of the date of value is not paid to the Company but is netted against his equity, our concluded value would be reduced by a comparable amount."

According to Monarch Bay, this meant that if Walters repaid the $266,000 he was entitled to 28.1789 percent of the $958,000 value; if he did not, "then it would be 'netted against his equity' (i.e., offset from the repurchase price), and Walters got $195,005.60 (28.18% of $692,000.00[,] (which is the $958,000.00 valuation less $266,000.00 unpaid advance amount), resulting in a net repurchase amount of $0.00 for his membership interests because the amount due from Walters' to Monarch Bay pursuant to his Advance Account exceed[ing] his repurchase price." Based on its calculations, in February 2016, Monarch Bay sent Walters a check for $2,099.40, which Walters, unsurprisingly, rejected.

In March, Walters filed a JAMS arbitration demand against Monarch Bay. Monarch Bay filed a separate demand the next day for breach of contract and declaratory relief. Among other things, Walters claimed that his Advance Account could not be

recovered by Monarch Bay, arguing that company documents stated that draws against commissions were not considered loans or returns of capital.

Prior to the hearing, Monarch Bay moved for "partial summary judgment" on the grounds that the Moss Adams valuation was conclusive as to the amount Walters was entitled to. Monarch Bay claims the arbitrator granted this motion, citing to a declaration of its own counsel filed later in the trial court.[1] Counsel admits there is no written record of this alleged ruling. The arbitrator's final award stated the following: "[Monarch Bay] moved for summary disposition that the expert's valuation is controlling and beyond dispute. The Arbitrator makes no separate ruling on this motion, as the issue is resolved by this Award."

Additional light is shed on the arbitrator's understanding of the import of the Moss Adams valuation by his ruling on a motion in limine filed by Monarch Bay. The arbitrator noted: "The parties have agreed to the finality of the Moss Adams evaluation, and that agreement will be enforced. However, the evaluation is relevant to the issues that remain. It remains to be seen at the hearing how the evaluation may affect the remainder of the case, or how it will be applied."

After the arbitration concluded, the arbitrator issued a final award, finding in Walters's favor. The award first notes that in accordance with the arbitration clause in the operating agreement, the award does not state the reasons. The arbitrator reached the following conclusions: (1) The value of Monarch Bay, for the purposes of repurchasing Walters's interest, was $958,000 – the amount set forth by the Moss Adams valuation; (2) Walters was liable for advances in the amount of $83,610, but was not liable for advances against commissions and certain other advances and charges; and (3) the total value of Walters's interest was $269.964, and less the deductions of $83,610, the amount

[1] Monarch Bay, oddly, refers to the trial court as "the District Court" in its briefs, as did counsel, repeatedly, at oral argument. The lower court in this matter was not any "District Court," but the Orange County Superior Court.

due was $186,354. The arbitrator concluded that Walters was entitled to prejudgment interest of 10 percent per annum from November 20, 2015. With respect to attorney fees and costs, the arbitrator determined Walters was the prevailing party and entitled to fees and costs of $238,000.

Walters subsequently moved to confirm the award and Monarch Bay moved to vacate. The trial court denied Monarch Bay's motion, finding that Monarch Bay had not shown grounds to vacate the award. The court granted Walters's motion to confirm the award. Monarch Bay now appeals.

II

DISCUSSION

California Arbitration Statutes and Standard of Review

"The California Arbitration Act (CAA; [Code Civ. Proc.,] § 1280 et seq.) 'represents a comprehensive statutory scheme regulating private arbitration in this state.'"[2] (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 10; see *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) Under the CAA, "[t]he scope of judicial review of arbitration awards is extremely narrow because of the strong public policy in favor of arbitration and according finality to arbitration awards. [Citations.] An arbitrator's decision generally is not reviewable for errors of fact or law." (*Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 33; see *Moncharsh*, *supra*, 3 Cal.4th at p. 11.)

Judicial review of an arbitration award is ordinarily limited to the statutory grounds for vacating an award under section 1286.2 or correcting an award under section 1286.6. (*Moncharsh*, *supra*, 3 Cal.4th at pp. 12-13; *Sunline Transit Agency v. Amalgamated Transit Union, Local 1277* (2010) 189 Cal.App.4th 292, 302-303.)

[2] Subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

There are, however, certain "narrow exceptions" to the general rule of arbitral finality. (*Moncharsh*, *supra*, 3 Cal.4th at p. 11.) Monarch Bay argues that two exceptions apply here, specifically, that the arbitrator exceeded his powers, and that its rights were prejudiced by the arbitrator's refusal to hear evidence. (§ 1286.2, subd. (a)(4), (5).)

As for the relevant standard of review, "[t]o the extent the trial court made findings of fact in confirming the award, we affirm the findings if they are supported by substantial evidence. [Citation.] To the extent the trial court resolved questions of law on undisputed facts, we review the trial court's rulings de novo. [Citation.] [¶] We apply a highly deferential standard of review to the award itself, insofar as our inquiry encompasses the arbitrator's resolution of questions of law or fact. Because the finality of arbitration awards is rooted in the parties' agreement to bypass the judicial system, ordinarily '"[t]he merits of the controversy between the parties are not subject to judicial review."'" (*Cooper v. Lavely & Singer Professional Corp.*, *supra*, 230 Cal.App.4th at pp. 11-12.)

No Grounds to Vacate

In sum, Monarch Bay's argument is that "the Moss Adams appraisal was a binding 'arbitration' that the Arbitrator refused to follow." As evidence of this assertion, Monarch Bay states that the arbitrator "granted" its motion for "partial summary judgment" on this point, then "allowed Walters to present evidence that contradicted his own ruling." According to Monarch Bay, the Moss Adams valuation was all that was necessary to decide every issue before the arbitrator; case closed.

This rather extraordinary claim requires some unpacking. We begin at the beginning – was the Moss Adams valuation an "arbitration?" The answer is a resounding no. The most obvious reason is the operating agreement itself, which we construe according to the usual methods of contractual interpretation. "We must interpret a

contract so as to give effect to the mutual intent of the parties at the time the contract was formed. (Civ. Code, § 1636.) 'The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.' (Civ. Code, § 1638.) Courts must also endeavor to give effect to every part of a contract, 'if reasonably practicable, each clause helping to interpret the other[s].' (Civ. Code, § 1641.)" (*Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC* (2010) 185 Cal.App.4th 1050, 1060.)

The method for determining a repurchase price is set forth in paragraph 6.6.2 of the operating agreement. As we explained above, each party was to conduct its own appraisal, and under certain circumstances, they were to jointly obtain the services of a third "appraiser," whose determination of the fair market value was "final, binding, and conclusive." Nothing in this provision refers to the appraiser's valuation process as an "arbitration." Nothing in Moss Adams's proposal letter referred to an "arbitration." Indeed, Moss Adams set forth the purpose of its work in its proposal: "Moss Adams will serve as the 'third appraiser' as set forth in Section 6.6.2 of the . . . Operating Agreement . . . for the purpose of rendering an opinion of [Monarch Bay's] 'Units' . . . as of April 30, 2015, or the most recent available financial statements . . . ." Nothing in Moss Adams's analysis refers to an "arbitration" either. It is entitled "Valuation Analysis."

In addition to both the operating agreement failing to state that the third appraiser would conduct an "arbitration," there is also the fact that the agreement itself includes a separate arbitration clause, some 18 paragraphs after the repurchase price clause, in paragraph 22. That clause states that "any dispute" arising out of the operating agreement or any company business "shall be resolved exclusively through binding arbitration conducted under the auspices of JAMS."

Thus, even if we were to assume there was any inconsistency between the repurchase price clause and the arbitration clause (and there is not), as any first-year law student is aware, the more specific provision controls over the more general.

(*Continental Cas. Co. v. Zurich Ins. Co.* (1961) 57 Cal.2d 27, 35.) The crystal-clear language that disputes shall be resolved by arbitration before JAMS precludes any other entity from conducting an arbitration.

Monarch Bay claims that any proceeding with certain attributes can be deemed an arbitration, apparently without regard to the parties' intent. It cites *Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 687-688. This was a very ordinary case where the appellate court upheld a trial court's determination that an employee had not agreed to arbitrate her disputes against her employer[3](*id.* at p. 678), and not relevant to the point advanced by Monarch Bay. Monarch Bay next cites a number of cases where insurance appraisals were deemed arbitration proceedings, but in none of those cases were there conflicting arbitration clauses or limitations on the conduct of arbitration. (*Khorsand v. Liberty Mutual Fire Ins. Co.* (2018) 20 Cal.App.5th 1028; *Lee v. California Capital Ins. Co.* (2015) 237 Cal.App.4th 1154.)

Thus, while an appraisal *may* be an arbitration, there is nothing in California law, despite Monarch Bay's arguments to the contrary, that states that all appraisals are arbitrations. Here, the parties agreed that any arbitration proceeding was to be conducted in front of JAMS – not in front of Moss Adams or any other appraiser. Thus, there was no agreement between the parties to treat the provisions of the repurchase price clause as an "arbitration."

Indeed, the most reasonable interpretation of the contract, as the trial court noted, was to treat the Moss Adams appraisal as conclusive as to the value of the company, while leaving all other issues, such as how to treat any advances, to determination in an arbitration proceeding before JAMS. This is exactly what the arbitrator did – he used the $958,000 valuation, referring to it, within the language of the

[3] Monarch Bay claims this case includes the following quotation: "[i]t is these hallmark attributes, not the label applied to the procedure, that determines whether a procedure is an arbitration." The case does not, in fact, include that quotation.

operating agreement, as "'final, binding, and conclusive.'" The Moss Adams valuation was respected by the arbitrator for the purposes the parties agreed to conduct the appraisal – determining the value of the company.

As to the issue of whether the arbitrator granted the summary judgment motion and then reversed himself, we find no substantial evidence that he did so. While the declaration of Monarch Bay's counsel states the motion was granted, this is contradicted by the arbitrator himself, and we conclude the arbitrator is the most credible source as to what motions he did and did not grant.

Monarch Bay has simply failed to establish error here. There is nothing in the record to suggest the arbitrator either exceeded his powers or ignored material evidence. All other matters, such as the amount Walters was liable for with respect to the Advance Account, is beyond the scope of our limited review following an arbitration award.

Prevailing Party

Monarch Bay next argues that the arbitrator exceeded his jurisdiction by determining that Walters was the prevailing party because the arbitrator, purportedly, failed to apply substantive California law. At oral argument, counsel was repeatedly asked to clarify how this was different from an unreviewable error of law, and in our view, failed to do so. We are unpersuaded that any such difference exists, and therefore Monarch Bay has failed to establish grounds for substantive review.

Even if Monarch Bay had done so, its argument that Walters is not the prevailing party, and therefore not entitled to attorney fees, because he "lost on the vast majority of his claims argued," is without merit. "[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subd. (b)(1).)

In *Hsu v. Abbara* (1995) 9 Cal.4th 863, which concerned a residential real estate transaction, the sellers won a clear victory, but the trial court denied them contractual attorney fees. The Supreme Court ultimately reversed, determining the sellers were entitled to their fees because they had obtained a "'simple, unqualified win.'" (*Id.* at p. 876.)

We need not belabor this point. Walters won $186,354; Monarch Bay won nothing. This is a simple, unqualified win, regardless of whether Walters was awarded less than his demand or sought additional relief. Accordingly, even if this were a reviewable issue, we would find no error by the arbitrator.

Installments

Monarch Bay next asserts that if this court affirms the arbitration award, we should hold the award was declaratory rather than monetary, and then "modify the judgment to allow Walters to collect the final award only by way of annual installments" over five years. (Capitalization and boldfacing omitted.) This argument was rejected both by the arbitrator and the trial court, which concluded the arbitrator "issued a monetary award." Monarch Bay simply offers no cogent argument here as to why this issue should be subject to review from the arbitrator's award, and we find none. The only relevant issues are substantive factual and legal questions that were for the arbitrator, not the trial court or this court, to decide. Further, the trial court had more than sufficient grounds to determine the award was monetary rather than declaratory.

Interest on Attorney Fees

Monarch Bay claims the trial court did not confirm the award as made by the arbitrator because the judgment includes interest on the attorney fee award, which the arbitrator's award did not include. The award stated: "Claimant David Walters shall recover from Respondent Monarch Bay Securities, LLC, . . . the sum of $186,354 as the

final repurchase price of his ownership interest in Monarch Bay, together with pre-award interest thereon at 10% per annum from November 20, 2015, and attorney fees, costs and expenses of $238,000." Thus, by mentioning attorney fees and costs after the interest award, states it clear that interest is on the principal award only. The judgment states: "[Walters] shall have and recover from [Monarch Bay] . . . [$186,354], with pre-Judgment interest at the rate of ten percent (10%) per annum from November 20, 2015. [Walters] shall also have and recover . . . [$238,000] of attorney fees, costs, and expenses, awarded in the Arbitrator's award, contractually deemed to have accrued on the commencement of the JAMS Arbitration, March 15, 2016." We do not find any inconsistency here. Like the award, the judgment first states the principal amount owed, "with pre-Judgment interest" and then awards attorney fees and costs. It is clear from the judgment's language, like the language of the award, that prejudgment interest applies to the principal amount only.

Walters argues that he is entitled to interest on the attorney fees and costs award under the operating agreement and the law, but we cannot even consider this point, as Walters did not appeal the judgment that was entered. No reversal is required here because there was no error. The award of prejudgment interest, under both the award and the judgment, applies to the principal amount only, not attorney fees and costs.

Motion for Sanctions

Walters filed a motion for sanctions against Monarch Bay for pursuing an appeal that was frivolous or for purposes of delay. (§ 907; Cal. Rules of Court, rule 8.276(a)(1).) "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of*

Flaherty (1982) 31 Cal.3d 637, 650.) Given the briefs in this case and the lack of legal merit set forth therein, we gave this motion very serious consideration.

Among numerous other points, Walters argues that Monarch Bay played fast and loose with the truth at numerous points in its briefs. At minimum, we agree that Monarch Bay certainly set forth some facts as if they were conclusive and undisputed, when they were anything but. Most notably, this includes Monarch Bay's baldfaced assertion that the arbitrator granted its motion for partial summary judgment, completely ignoring the fact that the arbitrator's final award says otherwise.

This is not the only occasion on which Monarch Bay asserted "facts" in its favor that were contested – another is Monarch Bay's insistence as to how much Walters was owed upon his withdrawal from Monarch Bay, and Monarch Bay's flatly inaccurate statement that "Walters does not prevail at the final hearing." (Capitalization and boldfacing omitted.) While arguments can be phrased in a manner most beneficial to the party making those arguments, it is simply improper, in a statement of facts, to be anything less than fully candid with the court, or to attempt to make the court believe erroneous facts.

Further, as we concluded above, Monarch Bay's legal arguments are completely unavailing, often bordering on plainly silly. It is difficult to believe, for example, that Monarch Bay's argument that the Moss Adams appraisal was actually an "arbitration" was intended as a serious legal contention, given all of the surrounding facts, especially the language of the operating agreement. It is also clear from the record that Monarch Bay has done everything possible to delay the payment of this arbitration award.

That said, however, "sanctions should be 'used most sparingly to deter only the most egregious conduct' [citation], and that an appeal lacks merit does not, alone, establish it is frivolous [citation]." (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 518.) We cannot quite find that this appeal should be deemed

frivolous. We also give consideration to the fact that, as we shall address in a moment, Walters is entitled to his attorney fees on appeal, which should serve as an appropriate remedy for the expenses he incurred in this appeal. While it is therefore a close call, the motion for sanctions is denied.

Attorney Fees on Appeal

Walters argues he is entitled to attorney fees on appeal under paragraph 23 of the operating agreement, which permits recovery of reasonable fees incurred "enforcing any right of the prevailing party." Monarch Bay's reply brief fails to dispute this, and we agree that it is a reasonable interpretation of the operating agreement. Walters may bring an appropriate motion for attorney fees on appeal in the trial court.

III

DISPOSITION

The judgment is affirmed. The motion for sanctions is denied. Walters is entitled to his costs on appeal, and may file a motion for attorney fees on appeal in the trial court.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.